COMMERCE-JUSTICE-STATE/9th Appellate Circuit Split

SUBJECT: **Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for fiscal year 1998 . . . S. 1022. Feinstein amendment No. 986.**

ACTION: AMENDMENT REJECTED, 45-55

SYNOPSIS: As reported, S. 1022, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for fiscal year 1998, will provide a total of $31.624 billion in new budget authority, which is $1.394 billion more than appropriated for fiscal year (FY) 1997 and is $4.022 billion less than requested. The President's request was so high primarily because he proposed more than doubling the amount for Commerce and Related Agencies in order to fund a proposed $3.5 billion capital acquisitions account for the National Oceanic and Atmospheric Administration (NOAA).

The Feinstein amendment would strike the section of the bill that will divide the Ninth Circuit Court of Appeals into two courts. That section will create a new Twelfth Circuit, comprising Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington. Remaining in the Ninth Circuit will be California, Guam, Nevada, and the Northern Mariana Islands. In lieu of that section, the Feinstein amendment would insert a requirement for a commission to be created to study all appellate circuits, and particularly the Ninth Circuit, and to report on its findings to Congress.

Those favoring the amendment contended:

We strongly oppose dividing the Ninth Judicial Circuit Court of Appeals on this appropriations bill. Appropriations bills are supposed to determine funding levels; they are not supposed to contain major, and controversial, legislative changes. A neutral commission needs to study this issue, and the commission's findings need to be reviewed, and then, if it is determined that a split is in order, Congress should consider legislation.

If there were a broad consensus that the Circuit should be divided the Feinstein amendment would not be necessary, but no such

(See other side)

YEAS (45)

Republicans (0 or 0%)	Democrats (45 or 100%)	
	Akaka	Johnson
	Baucus	Kennedy
	Biden	Kerrey
	Bingaman	Kerry
	Boxer	Kohl
	Breaux	Landrieu
	Bryan	Lautenberg
	Bumpers	Leahy
	Byrd	Levin
	Cleland	Lieberman
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dodd	Moynihan
	Dorgan	Murray
	Durbin	Reed
	Feingold	Reid
	Feinstein	Robb
	Ford	Rockefeller
	Glenn	Sarbanes
	Graham	Torricelli
	Harkin	Wellstone
	Hollings	Wyden
	Inouye	

NAYS (55)

Republicans (55 or 100%)		Democrats (0 or 0%)
Abraham	Hutchinson	
Allard	Hutchison	
Ashcroft	Inhofe	
Bennett	Jeffords	
Bond	Kempthorne	
Brownback	Kyl	
Burns	Lott	
Campbell	Lugar	
Chafee	Mack	
Coats	McCain	
Cochran	McConnell	
Collins	Murkowski	
Coverdell	Nickles	
Craig	Roberts	
D'Amato	Roth	
DeWine	Santorum	
Domenici	Sessions	
Enzi	Shelby	
Faircloth	Smith, Bob	
Frist	Smith, Gordon	
Gorton	Snowe	
Gramm	Specter	
Grams	Stevens	
Grassley	Thomas	
Gregg	Thompson	
Hagel	Thurmond	
Hatch	Warner	
Helms		

NOT VOTING (0)

Republicans (0)	Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

consensus exists. In fact, most legal experts do not think it is necessary. On four occasions, the Federal judges in the Ninth Circuit and the practicing lawyers in the Ninth Circuit judicial conference have voted their opposition to the idea. The official bar organizations of Arizona, California, Hawaii, Idaho, Montana, and Nevada and the National Federal Bar Association have all taken positions against a split. No State bar organization in the Circuit has taken a position in favor of a division. For those Senators who might think that this issue is partisan, we also note that Representative Hyde, the Chairman of the House Judiciary Committee, and Governor Wilson of California, our former colleague who is a Republican, support the Feinstein amendment.

Opponents of the Feinstein amendment contend that the Ninth Circuit's large size makes it operate slowly and inefficiently. They also contend that with 28 judges, it is not possible for each of those judges to know each other, and the result has been internally inconsistent decisions and an excessively high case turnover rate by the Supreme Court. These charges are serious, and bear further examination, though we do not see any real evidence of their validity. For instance, our colleagues talk about how 95 percent of the Ninth Circuit cases that were reviewed by the Supreme Court last year were overturned, but that percentage just represents the 28 out of 29 cases that were reviewed; it says nothing at all about the 4,480 cases that were not reviewed.

In addition to questioning the advisability of splitting this court, we have several objections to the manner in which it will be split. First, creating a new circuit will entail administrative costs. Second, the distribution of judges will be unfair; Nevada and California, with 35 million people, will get 15 judges, but the new Twelfth Circuit will get 13 judges. Third, the Twelfth Circuit will have a strange, gerrymandered shape. Fourth, it will encourage venue shopping; for instance, as different maritime case law develops between the two circuits, vessel owners that operate in both jurisdictions might look at those decisions to decide in which jurisdiction they will file suit. These problems could have been avoided had the normal legislative process been followed, but no hearings have been held on this proposal.

Though our colleagues have talked about such issues as collegiality and efficiency, we suspect that the main reason for the proposed split is to take away California judges' jurisdiction over western States. A common perception is that the Ninth Circuit is full of liberal, activist judges who are willing to interpret the Constitution in ways that are unfavorable to the interests of Westerners, especially with regard to land-use issues. We believe that the hope of some Senators is to have a court that will look with more sympathy on western interests. As we see matters, such considerations are inappropriate. The United States has one Constitution, and interpretations of it should be consistent across the country. Over time, we suppose it would be possible for the western States to have judges who were sympathetic to their issues nominated and confirmed to the new Twelfth Circuit, with the effective result that we would have a "western" Constitution develop from Twelfth-Circuit case law. We oppose that result, as should our colleagues.

We are willing to consider a split, but only if the judges, bar associations, and other legal associations involved agree that it is advisable. Right now, they are advising exactly the opposite, and we are inclined to agree with them. At a minimum, we ought to get nonpartisan, expert advice before we act. We therefore urge our colleagues to accept the Feinstein amendment as a substitute for the bill provision.

Those opposing the amendment contended:

Anyone who believes that there is anything remotely new about the proposal to divide the Ninth Circuit Court has been sleepwalking through history. For the past 23 years, starting with the Hruska Commission which recommended a division, there have been constant legislative efforts to divide this circuit. Numerous bills have been introduced and numerous hearings have been held. In the last Congress a bill was considered that would have made three circuits, but it never reached the Senate floor because of a threatened filibuster from the Senators from California. We do not need another study; we need results. Our colleagues from California need to come to terms with the fact that a split is inevitable, because the problems that make it necessary are getting worse all the time.

All of the problems with the Ninth Circuit stem from its size. There are presently 13 Federal circuit courts of appeals (two of them are unnumbered). The Ninth Circuit is larger than the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 11th circuits combined. It has more than 50 million people within its jurisdiction, and, if it remains intact, it will have close to 100 million within 13 years. It has 28 judges, and a campaign is underway to increase the number of its judges by 10. The next largest appellate circuit has only 17 judges.

According to the Judicial Conference, any circuit with more than 15 judges is unworkable. The reason is that our system of justice relies heavily upon the principle of "stare decisis," or precedent. Appellate decisions are made by panels of judges in a circuit, or, on more important cases, by all the judges in a circuit sitting en banc. In the Ninth Circuit, though, decisions are never made en banc because a 28-judge panel would be too large. Just as in other circuits, decisions are often made by 3-judge panels, and orders, such as stays, are issued by single judges. With 28 judges there are 3,276 possible combinations of 3-judge panels. Cases that are very similar are often considered by different panels at the same time, and the decisions in those cases can conflict. Further, because so many cases are considered by so many different panels, judges cannot keep up with each other's decisions, many of which are unpublished, that are made at different times. In other words, judges in the Ninth Circuit are ignorant of precedent within their own circuit, and numerous conflicting precedents, and an increase in litigation, are the result. In smaller circuits, judges frequently serve with all the other judges of the circuit. They know each other's decisions, and develop a common approach to resolving issues. In

the Ninth Circuit the inability to keep up with precedent has resulted in renegade judges who feel free to come up with any interpretation of the Constitution or law they wish.

The Supreme Court, as a practical matter, can review only a small fraction of Federal appellate decisions each year. For the judicial system to operate properly, therefore, it needs to be able to depend on appellate courts, and lower courts, to apply its rulings to similar cases. Last year, the Supreme Court heard appeals on 29 cases from the Ninth Circuit, and it overturned the decisions in 28 of those cases. This 95-percent reversal rate is extremely high, but it is common for this circuit--it has not gone below 75 percent in many years. By way of contrast, the Eighth Circuit, which had the second-highest number of cases reviewed, had only 4 cases out of 8 overturned.

In arguing for this amendment, our colleagues have stated that the judges and lawyers in the Ninth Circuit are happy with the current situation. We note that the feeling in the legal community is not unanimous; we have quotes from some of the judges involved, from former Chief Justice Burger, from Justice Kennedy, and from the Justice Department stating that the appellate court should be divided. The real question we must stay focused on, though, is not whether the judges and lawyers of the Ninth Circuit are pleased with the situation, but whether it is a good situation to have. The answer, emphatically, is that it is not. More basic to a free society than democratic institutions is the rule of law. If laws and precedents are not applied uniformly, then the administration of justice becomes arbitrary.

Some Senators have suggested that the main purpose of this provision is to set western States free from rule by Californian judges. Certainly it is true that judges from non-Californian States are underrepresented on the circuit. Hawaii, for instance, does not have any of the 28 judges. However, our colleagues' suggestion is wrong. When the court is divided, the same judges will be making decisions. Further, we do not believe that judges' opinions are determined by the accident of geography; home-bred liberals and conservatives can be found in any State. In one respect, we concede that dividing this court will be more helpful to States like Idaho, but the difference is practical rather than ideological. The large size and caseload of this appellate court has lengthened the amount of time it takes it to reach a decision. The national median time from a filing to a decision is 315 days; the median time in the ninth circuit is 429 days. Thus, for example, a lawsuit that stops a salvage timber harvest in Idaho, even if it is resolved in the timber company's favor, may not be resolved until the timber has rotted and is useless.

Our colleagues have raised a few practical objections to the split as well. For instance, they have suggested that it would make maritime law difficult if there were two appellate circuits on the West Coast. However, the East Coast has five appellate circuits, yet boats still somehow manage to sail in and out of East Coast ports. Our colleagues have also suggested that it is wrong to have only 2 States in a single district because it has never before been done. In response, it has never before been necessary because States always had smaller populations. We remind our colleagues that most proposals favor putting California into two courts, but out of deference to our colleagues from California our proposal will not do so. Further, the reason that there is only one State paired with California is that only one State, Nevada, wanted to be associated with it. Senators from all the other involved States asked to be put in the new circuit court.

Our colleagues from California may like the fact that the largest appellate circuit is based in their State, but they need to come to terms with the fact that it is harming the administration of justice and a split is inevitable. If they do not accept this proposal, it is likely that California will soon end up in two separate districts. The language of this proposal closely follows the proposal that was considered in hearings last Congress. The changes that were made were made to accommodate Senators who oppose dividing the Circuit. We urge our colleagues to accept the inevitable and vote against the Feinstein amendment.